SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 637

TOWN OF HEMPSTEAD, PALMER D. FARRINGTON, as Presiding Supervisor of the Town of Hempstead, RALPH G. CASO, as Supervisor of the Town of Hempstead, JOHN H. BENOIT, EASA EASA, JAMES F. NIEHOFF, and GEORGE A. MURPHY, as Councilmen of the Town of Hempstead, and JOHN A. MORHOUS, as Town Attorney of the Town of Hempstead,

Petitioners,

against

AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., NORTHWEST AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., and UNITED AIR LINES, INC.,

THE PORT OF NEW YORK AUTHORITY, and CHARLES H. RUBY, as President of the Air Line Pilots Association, International and as Representative of that class of persons hereinafter mentioned, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association, on behalf of the Association and on behalf of that class of persons hereinafter mentioned, and HARRY F. CLARK, THOMAS M. BARTLEY, JR., and RUSSELL G. DERICKSON, individually and on behalf of the class of persons hereinafter mentioned,

THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Town of Hempstead, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 17, 1968.

Citations to Opinions Below

The Opinion of the United States Court of Appeals, printed in the Appendix hereto, *infra* page 1a, is not officially reported.

The opinion of the United States District Court for the Eastern District of New York, printed in the Appendix hereto, *infra* page 16a, is reported in 272 F. Supp. 226.

Jurisdiction

The jurisdiction of Your Honorable Court is invoked under 28 U.S.C. 1254(1).

Questions Involved

1. Whether the field within which the Town's Ordinance operates has been preempted by the federal government so as to prevent state and local municipalities from acting.

2. Whether the Town's Ordinance causes an undue burden on interstate commerce.

3. Whether the Town's Ordinance is in direct conflict with valid applicable regulations enacted by the federal government.

Constitutional and Statutory Provisions

The case involves provisions of the Federal Aviation Act of 1958, as amended 49 U.S.C. §1301 *et seq.*, the relevant provisions of which are set forth in the Appendix hereto, *infra* page 35a.

Statement

Jurisdiction of the District Court was invoked under an act of Congress regulating commerce pursuant to Title 28

U.S.C., Section 1337, and under the Constitution, Laws and Treaties of the United States, which the Court had jurisdiction pursuant to Title 28 U.S.C., Section 1331.

Petitioner, hereinafter referred to as the Town, is the largest town in the State of New York, with an estimated population in 1963, of nearly 806,000. Lying to the east of John F. Kennedy International Airport (JFK), the Town is primarily residential, with approximately 150,000 people living within three miles of the Airport. In 1963, about seventy-seven percent of all flights landing or taking off at Kennedy involved some flight over the Town. These flights varied in height—on landings, as low as 200 to 275 feet; and on take-offs, at altitudes as low as 400 and 600 feet.

The people surrounding the Airport, as well as many others across the nation, have suffered from the severe noise caused by aircraft. In an attempt to eliminate this problem, the Town, in 1963, (as amended on March 10, 1964), added Article II to its "Unnecessary Noise Ordinance," forbidding anyone from operating a mechanism or device (including airplanes) which creates a noise within the Town exceeding either of "two limiting noise spectra."

Nine major American-flag air carriers, the Port of New York Authority and the Air Line Pilots Association, brought suit claiming the Ordinance would prohibit airplanes using JFK from flying over the Town, thus restricting landing and take-off patterns normally adhered to by those airplanes. The Administrator of the Federal Aviation Agency intervened in the proceedings, also seeking a declaration that the Ordinance was unconstitutional.

Extensive hearings were conducted in the District Court which resulted in a decision accompanied by lengthy findings of fact. The District Court found the Ordinance unconstitutional because:

(a) it operates in a field which the national government has exclusive power to regulate under the commerce clause;

(b) it unduly burdens interstate and foreign commerce;

(c) it is in direct conflict with applicable and valid regulations of the national government.

The Court below affirmed the District Court. However, its decision is based solely on the conclusion that the Ordinance was in direct confiict with applicable and valid regulations of the national government. The Court commented that it was unnecessary to reach a determination regarding preemption and undue burden on interstate commerce.

Reasons for Granting the Writ

(a.) The issues raised on this appeal present the first judicial test of a local noise ordinance regulating noise emanating from aircraft.

The importance of the case lies not only in the factual and legal questions presented, but involves the entire relationship of federal-local governmental interests. It concerns the problem of whether a Federal Agency or local municipality should prescribe a cure for the ills facing its residents, when these ills continue and spread under the protective covering of an allegedly overriding national interest.

The national interest claimed to exist in this case is not grounded in the Federal Aviation Act of 1958, as one might expect, but rather in the directives and regulations of the Federal Aviation Administrator. The Court below determined that in order for aircraft to comply with the Ordinance, they would have to attain altitudes much higher than those set by the FAA for safe landings and take-offs. These regulations of the FAA are no more than *ad hoc* directives and certainly are not imbued with national interest. In fact, the runway locations at each airport are established on wind conditions at that particular location. Hence, these *ad hoc* directives must vary from airport to

airport, depending on the peculiar situation existing at that airport. The Town offered proof showing that its Ordinance could be complied with by a plan which is a logical extension of existing procedures. This plan would not affect the traffic capacity at the Airport, but would retain the safety factors now existing. The Courts below, however, while acknowledging the "ingenuity" of the plan, dismissed it as being irrelevant.

In finding the plan irrelevant, the District Court determined that the entire field of aircraft flight had been preempted by the federal government. The reality of preemption means that no local government can legislate in the same field occupied by the federal government. Once the District Court determined preemption existed, the remaining conclusions were logical extensions thereof, including the finding that our plan was irrelevant. However, the District Court's ruling of preemption was erroneous (see Point (b.), *infra*). The Circuit Court avoided answering this issue and, instead, rested its opinion on the fact that the Ordinance was in direct conflict with existing valid federal regulations. The District Court's decision, as pointed out earlier, was based on three grounds; to wit, preemption, conflict, and undue burden on interstate commerce.

The Circuit Court commented that a finding based on any one of these grounds would be sufficient to declare the Ordinance unconstitutional. Without conceding the validity of this statement, the fact is that a holding on any one of the grounds, other than preemption, would not permit our plan to be summarily dismissed as being irrelevant. It is only when the field is preempted that the Town is powerless to act. Assuming *arguendo*, the field of aircraft aviation is not preempted, the Town should be permitted to play a role, no matter how small, in the operation of an airport which has such a great effect on its residents. In essence, the Town argues that the Airport is improperly operated and its continued improper operation is being condoned under some alleged federal interest.

The Town's plan was developed from evidence and exhibits introduced by the plaintiffs (respondents). The evidence and exhibits show that the Airport can be conducted differently from its present operation, while continuing to accommodate the large amounts of traffic now using JFK. The plan would also permit aircraft to avoid the Town and equally populous areas. We submit that such an important plan cannot be labeled "irrelevant." At the very least, the Town should be permitted the right, at a full trial, to explore its plan in order to prove its feasibility. This right should be permitted within the proper legal framework and not precluded by the erroneous determination of preemption as found by the District Court, which error was not cured by the decision of the Circuit Court.

The issues in this case involve the entire relationship of federal-local governments, and should be resolved by this Court.

(b.) In this case a conflict exists between decisions of state and federal courts.

The District Court determined that the field in which the Ordinance operates was preempted by federal legislation.

As noted above, the Court of Appeals did not make a decision on this question. However, this determination is erroneous because neither the Federal Aviation Act nor any other federal legislation contains noise criteria. In fact, the Supreme Court of California, in the case of *Loma Portal Civic Club* v. *American Airlines, Inc.*, 39 Cal. Rptr. 708, 394 P. 2d 548, determined that regulation of aviation had not been preempted by federal regulations. The Court there stated, at page 554:

> "We note that noise abatement is a Federal as well as state aim. . . ."

Thus, we have conflicting decisions of a state court and the Courts below in the interpretation of a federal statute.

This Court will entertain an appeal where decisions of state courts conflict with those of federal courts. (*Francis* v. *Southern Pacific,* 333 U.S. 445, 68 S.Ct. 611).

The problem is further complicated by the Second Circuit's decision in this case, where the Court refused to answer the question of preemption. The decision, however, noted that, in an earlier case, *i.e., Allegheny Airlines* v. *Village of Cedarhurst,* 238 F 2d 812 (2 Cir 1956), the Court held that the entire field of regulation of aircraft flight has been preempted by the federal government. We submit that a conflict exists requiring a determination by this Court.

(c.) The issues involved are of national importance.

This case is also important because there are many communities throughout the United States, adjoining major airports, that are awaiting a final adjudication of the Town's Ordinance.

If the Ordinance were to be sustained, one could almost certainly expect similar type ordinances being enacted by these communities. In fact, many communities have already attempted to eliminate the horrendous disturbance caused by aircraft. We have already alluded to the *Cedarhurst* case. In another case (*American Airlines, Inc.* v. *City of Audubon Park,* No. 5828 W. D. Ky., April 1, 1968), a local minimum altitude ordinance was declared invalid following the decision by Judge Dooling in the case at bar.

We are informed that litigation involving aircraft noise ordinances or minimum altitude ordinances has, by agreement, been stayed pending ultimate decision on the Town's Ordinance. Hence, this case is not only of local importance but is of public importance in the national sense of the term. Due to the importance of this case, we respectfully request this Court to grant certiorari.

(d.) A novel question is presented necessitating interpretation of the federal statute.

Inherent in the decisions of the lower courts is an interpretation of a federal statute, i.e., the Federal Aviation Act of 1958.

A question arises as to whether this federal legislation is dependent upon local laws for measurement of its terms or is intended to operate uniformly throughout the nation. We have already touched upon this argument in Point (a.) above, but the question is in no way to be restricted to noise abatement. There are many other problems facing local communities surrounding airports, this case being the first real test of the relationships between the two.

This Court has generally granted certiorari where the construction of a federal statute is at issue. Appeals have been entertained in connection with the National Labor Relations Act, the Selective Service Act, the Federal Employees' Liability Act, the Civil Aeronautics Act, and still many others that need not be enumerated (*Mays Department Stores* v. *NLRB,* 326 US 376, 66 SCt. 203; *Estep* v. *United States,* 327 US 114, 66 SCt. 423; *Poff* v. *Pennsylvania RR.,* 327 US 399, 66 SCt. 603; *Transcontinental & Western Airline Inc.* v. *Civil Aeronautics Board,* 336 US 601, 69 SCt. 756). We submit that a novel and important case is presented, requiring this Court to construe the Federal Aviation Act of 1958.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari to the United States Court of Appeals, Second Circuit, should be granted.

Respectfully submitted,

HOWARD E. LEVITT
Attorney for Petitioners

(APPENDIX)

Opinion of the United States Court of Appeals

SMITH, *Circuit Judge*:

The Town of Hempstead appeals under 28 U. S. C. § 1292(a)(1) from an order of the District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, granting a preliminary injunction against enforcement of its Unnecessary Noise Ordinance (No. 25), Article II, as amended March 10, 1964, so far as it applies to aircraft using John F. Kennedy International Airport. Judge Dooling's opinion appears at 272 F. Supp. 226.

Since the District Court's complete and precise findings of fact (see appellant's appendix, pp. 200a-264a) as to a great number of technical matters are not being attacked on this appeal, a short statement of the facts may suffice. The Town of Hempstead, primarily residential, is the largest town in New York State, with an estimated population in 1963 of nearly 806,000. It lies to the east of John F. Kennedy International Airport ("JFK"), and it is estimated that 150,000 people live in its incorporated villages which lie within three miles of the Airport. These people share with many others, inside and outside Hempstead and across the country, a severe aircraft noise problem which has developed in the years since the Second World War. As the District Court said:

> In the years since 1948 . . . turbo and fan jet aircraft have all but displaced turbo and piston driven propeller craft. Larger, heavier and faster than propeller craft, the jets have demanded lengthened runways, and exacted new constants of air traffic management . . . [T]he inverted truncated cone of air space resting on the airport, that can be thought of as representing the zone marked by the jets' landing glide slopes of about three degrees, was far nearer the edges of airport and closer down on the bordering communities. It was as if every existing propeller craft runway had been suddenly moved out toward

> the boundary of the airport . . . [T]he impact on the surrounding communities was marked and unhappy.
>
> 272 F. Supp. at 228-29.

Because of the frequency with which jets fly in and out of JFK, the problem in Hempstead may be somewhat worse than in other communities. The District Court found that:

> There is credible evidence that the noise of an aircraft overflight in Hempstead is frequently intense enough to interrupt sleep, conversation and the conduct of religious services, and to submerge for the duration of the maximum noise part of the overflight the sound of radio, phonograph and television. (Finding #127)
>
> There is credible evidence that the noise of an aircraft overflight in Hempstead is frequently intense enough to interrupt classroom activities in schools and to be a source of discomfort to the ill and distraction to the well. (Finding #128)
>
> It is a fair inference from the affidavits, the demonstration [in the courtroom] of the sound levels recorded in the Town and the evidence of frequency of overflights that airplane noise is a factor of moment affecting the decisions of people to acquire or dispose of interests in real property in the areas within the Town affected by the sound of airplane overflights. (Finding #129)

In an attempt to deal with the problem, the Town added a new article to its Unnecessary Noise Ordinance, forbidding anyone from operating a mechanism or device (including airplanes) which creates a noise within the Town exceeding either of two "limiting noise spectra." Claiming that the ordinance would prohibit airplanes using JFK from flying over the town, and thus would restrict the

landing and take-off patterns and procedures normally adhered to by those airplanes, nine major American-flag air carriers, The Port of New York Authority, Charles H. Ruby as president of the Air Line Pilots Association, three air line pilots, individually and as representatives of their class, and the Administrator of the Federal Aviation Agency (as intervenor) sued to enjoin the enforcement of the ordinance against them.

The Town argued initially that aircraft could fly over the Town in compliance both with the ordinance and with the FAA regulations governing landing and take-off patterns and procedures. There was no question, however, but that at the time the suit was brought, take-offs and landings at JFK regularly produced noise exceeding the relevant limiting noise spectrum of the ordinance.

The District Court made crucial findings of fact which contradict the Town's initial argument that compliance with the ordinance is possible without alterations in flight patterns and procedures, and the Town has now shifted its ground, arguing in essence that the ordinance is not an undue burden on interstate commerce, because "the Town has unveiled a plan pursuant to which approximately 98% of all flights [to and from JFK] will avoid the Town while, at the same time, the present traffic capacity will be unaffected." (Town's brief, p. 22).

The crucial findings of fact are Nos. 281-294.[1] The

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[1] 281. The Town of Hempstead intends to enforce the Amended Ordinance and has counterclaimed for an injunction against plaintiffs' violation of the Ordinance.

282. Compliance with the Hempstead Ordinance's regulation of noise production and duration would be determinative of the altitudes at which and the flight paths by which commercial aircraft could operate into and out of Kennedy Airport on take-offs and landing approaches, and would exclude them from paths that traverse Hempstead when conducted in accordance with existing traffic patterns and airport and FAA procedures, and the flight require-

court found that compliance with the ordinance would be determinative of the altitudes at which and flight paths by which commercial aircraft could fly into and out of JFK;

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ments flowing from the Ordinance would be in large part incompatible with the existing traffic patterns and FAA procedures.

283. The altitudes and flight paths which the Ordinance would require commercial aircraft to use in order to comply, would directly conflict with the altitudes and flight paths now established for commercial aircraft under existing FAA regulation of air traffic at Kennedy Airport.

284. Compliance with the Hempstead Ordinance would require a redesigning by the FAA of the present set of SIDs and landing approaches for Kennedy Airport, and integrating the redesigned procedures with the related procedures at the other Metropolitan Airports; it could not preserve the safety margins of the existing procedures without restricting the traffic handling capacity of Kennedy Airport.

285. The combination of the physical facts of wind and weather conditions, the FAA air traffic regulations and enforcement of the Hempstead Ordinance would radically reduce the availability of Kennedy Airport for air transportation.

286. There is no reliable evidence that a set of procedures could be devised for Kennedy Airport in the present state of aviation development which could without substantial sacrifice of the interest in flight safety assure either practical or complete compliance with the Hempstead Ordinance.

287. The radical reduction of the capacity of Kennedy Airport to handle scheduled commercial aviation which would result from the enforcement of the Hempstead Ordinance would cause very great economic loss to each of the plaintiffs herein, and in consequence, to the metropolitan New York community.

288. It is a fair inference from the evidence at this stage of the case that there is a substantial risk that enforcement of the Ordinance would result in some of the commercial airlines' withdrawing some or all of their scheduled operations from Kennedy Airport, and if any substantial part of that traffic were lost, Kennedy Airport would no longer be a viable economic operation for the Port Authority.

that the flight requirements flowing from the ordinance would be in large part incompatible with existing traffic patterns and FAA procedures; that compliance would mean redesigning of the flight patterns for JFK, together with a reintegration of the redesigned patterns with those for the other New York City airports, and that the safety margins of the existing procedures could not be preserved

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289. No other airport, or combination of airports, in the metropolitan New York area could handle the passenger and cargo traffic presently handled at Kennedy Airport, and substantial restriction of the area traffic handled through Kennedy Airport would, until new facilities were created, curtail the air transport of the area.

290. The interstate and foreign commerce presently conducted at and through Kennedy Airport is an essential and integral part of this country's system of air commerce.

291. Continued commercial operation of Kennedy Airport at capacity is integral to the free flow of interstate and foreign commerce, and the enforcement of the Hempstead Ordinance with its constriction of the ability to make optimum use of Kennedy Airport would seriously burden the conduct of such commerce.

292. Enforced compliance with the noise criteria of the amended Hempstead Ordinance during the continuance of the present litigation will irreparably injure the plaintiff airlines, the Port Authority, and the airline pilots through curtailing the use of Kennedy Airport and jeopardizing its continuance as the primary intercontinental airport of the Metropolitan area.

293. Disregard, until final adjudication, of the limitations imposed by the noise criteria of the amended Ordinance exposes to repeated prosecution each person who operates an airplane or causes one to be operated which creates in Hempstead a noise exceeding the limiting noise spectra of the Ordinance.

294. The disadvantage to the inhabitants of the defendant Town from continuance of the operation of Kennedy Airport on substantially the present basis is outweighed by the advantages to the total social interest, including that of the inhabitants of the Town in the continued operation of Kennedy Airport in its present legal Framework.

without restricting the traffic handling capacity of JFK; and that there is no reliable evidence that a set of procedures could be devised for JFK in the present state of aviation development which could, without substantial sacrifice of the interest in flight safety, assure compliance with the ordinance. None of these findings have been attacked on this appeal, except that the Town still insists that its alternate plan, submitted to the District Court, could steer most flights away from the Town, thus assuring compliance with the ordinance. Apart from the lack of a showing that the District Court's finding to the contrary is clearly erroneous, it is clear that given the necessary determination of the legal issues in the case, the Town's alternate plan, even if it *were* feasible, would be irrevelant.

On the basis of his detailed and thorough findings of fact, Judge Dooling concluded: (1) that the ordinance is an unconstitutional burden on interstate commerce; (2) that the area in which the ordinance operates has been pre-empted by federal legislation and regulation; and (3) that the ordinance is in direct conflict with valid applicable federal regulation.

Any one of the District Court's three conclusions is enough, of course, to make the ordinance invalid. There is no need for determination of the validity of the first two grounds, since the third ground for the ordinance's invalidity (that is in conflict with applicable federal regulation) is an ample basis for affirmance. In *Loma Portal Civic Club* v. *American Airlines, Inc.*, 39 Cal. Reptr. 708, 394 P. 2d 548 (1964), the California Supreme Court affirmed a refusal to enjoin flight operations at a public airport at the behest of the owner of property in the neighborhood of the airport, basing its decision on the narrow ground that it is clearly against the policy of the State of California for its courts to interfere with airport flight patterns which are established by federal regulation. The

court explicitly refused to accept an argument that the regulation of aviation has been pre-empted by federal legislation and regulation; indeed, the opinion indicated that the court thought there was no pre-emption.

Before considering the grounds advanced by the District Court for the conclusion that the ordinance is invalid, we may point out that this case has nothing to do with questions of landowners' rights to compensation for overflights of their land which amount to a "taking" of their property. [See *United States* v. *Causby*, 328 U. S. 256 (1946), and *Griggs* v. *Allegheny County*, 369 U. S. 84 (1962).] All that is involved is the validity of the ordinance.

We consider first the point that the ordinance is in direct conflict with a valid applicable federal regulation. The Federal Aviation Act of 1958 provides, *inter alia*:

> There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States. [49 U. S. C. § 1304]
>
> The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace . . . [49 U. S. C. § 1348(a)]
>
> The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and

> rules for the prevention of collision . . . [49 U. S. C. § 1348(c)]

As Judge Dooling found, the Administrator (Administrator of the Federal Aviation Agency, see 49 U. S. C. § 1301 (1)) has promulgated extensive regulations under the Act, which unquestionably control the patterns and procedures of aircraft flying into and out of JFK.[2] The ordinance

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[2] See Findings Nos. 67-104, as follows:

67. The Administrator has established an extensive system of electronic navigational aids and a network of Federal Airways and Jet Routes surrounded by controlled airspace for aircraft operating within the air traffic control system. The Federal Airways are eight miles wide and extend from one navigational aid (or intersection) to another such aid (or intersection); Federal Airways have a floor of 700 feet mean sea level ("MSL") and a ceiling at 18,000 feet. The airspace within these Federal Airways is designated as control areas, except the portions above 14,500 feet MSL. Those portions lie within the Continental Control Area that encompasses all airspace of the United States between 14,500 feet MSL and 45,000 feet MSL.

68. The Jet Routes, also eight miles wide, are between 18,000 feet MSL and 45,000 feet MSL. They are within the Continental Control Area. The higher altitudes where most Jet Route operation occurs, are within the Positive Control Area, *i.e.*, the airspace between 24,000 feet MSL and 60,000 feet MSL where all operations are under positive control.

69. The networks of Federal Airways and Jet Routes converge upon holding patterns or gates through which aircraft pass and from which they are vectored by "Air Traffic Control" over designated courses and at specified altitudes to the points from which they execute their approach for landing at the airport.

70. "Air Traffic Control" means a service operated by appropriate authority to promote the safe, orderly, and expeditious flow of air traffic.

71. Control over the aircraft within the Kennedy Airport control zone and within certain portions of the adjacent area is exercised by Federal Aviation Agency Airport Traffic Control Tower personnel located at the airport.

and these regulations are unquestionably in direct conflict. They are in conflict not because the regulations and the ordinance impose different standards for noise, but be-

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72. The Federal Aviation Air Traffic Control personnel at the Air Route Traffic Control Center at Islip, Long Island, New York, exercise control throughout the rest of the New York Area over aircraft operating under Instrument Flight Plans. These facilities are operated on a 24-hour basis, 7 days a week.

73. To provide separation between aircraft under its control, Air Traffic Control assigns altitudes for holding at the gates from which aircraft are vectored to points of landing approach, or holding patterns, and for operating on the Federal Airways and Jet Routes.

74. The Administrator has established a system for the control of air traffic which provides for separation, and which operates within defined airspace identified as "control zones" and "control areas."

75. The airspace within a "control zone" below an altitude of 2,000 feet above the surface, and within a horizontal radius of five statute miles from the geographical center of any airport, is designated as the "airport traffic area" (FAR 1.1). Unless otherwise authorized by Air Traffic Control, a pilot operating within an airport traffic area must maintain two-way radio communication with the control tower (FAR 91-87(b)). The pilot, whether operating in a control zone or area, is required to comply with any instructions that may be issued by Air Traffic Control [FAR 91.75(b)].

76. "Control zones" encompass all of the airspace from the surface to infinity, within five miles of the geographical center of an airport. The control areas are of varying elevations and dimensions. Part of the Town of Hempstead lies within the control zone of Kennedy Airport. The remainder of the Town lies beneath a control area which extends from 700 feet above the surface to 14,500 feet MSL.

77. The rules established by the FAA for the control of air traffic are broadly separated into Visual Flight Rules (VFR) and Instrument Flight Rules (IFR) (FAR, Part 91).

78. Flight pursuant to IFR is required when weather conditions do not meet specified minima of ceiling and visibility (FAR §§ 1.1, 91.105, 91.107).

cause the District Court has found, in view of the present state of development of noise suppression techniques, that compliance with the noise ordinance would require altera-

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79. When the specified minima of ceiling and visibility are met, flights may be conducted pursuant to VFR (FAR §§ 91.105, 91.107).

80. Whether their operations are conducted pursuant to IFR or VFR, flights through any airspace subject to federal control are obliged to obey all instructions given by the Air Traffic Control service of the FAA (FAR §§ 91.75(b), 91.85, 91.87).

81. The Air Traffic Control service of the FAA maintains control over en route aircraft by radio communication from control Centers across the nation.

82. The Continental United States is divided into numerous such Centers, each of which is subdivided into sectors, and aircraft are relayed from one Center to the next in their flights across country.

83. The Air Traffic Control Center for the New York Center is located in Islip, New York.

84. The pilot and his aircraft while under the surveillance and jurisdiction of the Air Traffic Control personnel at Islip or Kennedy Airport are required to conform with all the prescribed protedures (FAR § 91.115).

85. IFR flights descending fom the gates or holding patterns on which the Federal Airways converge are provided separation from other aircraft under Air Traffic Control.

86. No person may operate an aircraft in controlled air space under Instrument Flight Rules unless he has received an appropriate Air Traffic Control clearance (FAR § 91.115(b)).

87. "Air traffic clearance" means an authorization by Air Traffic Control, for the purpose of preventing a collision between known aircraft, for an aircraft to proceed under specified traffic conditions within controlled airspace (FAR § 1.1).

88. Compliance with air traffic control clearances is required by Federal Aviation Regulations [FAR § 91.75(a)].

89. At an airport with an operating control tower, no pilot may taxi an aircraft on a runway, or take-off or land an aircraft unless

tions in the flight patterns and procedures established by federal regulation.

In *Allegheny Airlines* v. *Village of Cedarhurst*, 238 F. 2d 812 (2 Cir. 1956), this court relied on the provisions of the

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he has received an appropriate clearance from Air Traffic Control [FAR § 91.87(h)].

90. No person may, in general, deviate from an air traffic control instruction in an area in which air traffic control is exercised (FAR § 91.75); however, the procedures and regulations recognize that in a given instance, where he deems it necessary for the safety of flight, the pilot may deviate from such procedures or regulations (FAR §§ 91.3, 91.75).

91. No person may operate a civil aircraft in Instrument Flight Rule Conditions unless the aircraft carries enough fuel (considering weather reports and forecasts, and weather conditions) to complete the flight to the first intended point of landing, to fly from that point to the alternate airport, and to fly thereafter for 45 minutes at normal cruising speed (FA § 91.23).

92. When an instrument letdown to an airport is necessary, the aircraft must use a standard instrument aproach procedure prescribed by the Administrator for that airport [FAR § 91.117(a)].

93. The Administrator has promulgated rules governing the operation of aircraft outside as well as within controlled airspace (e.g., FAR §§ 91.67, 91.79). For example, Federal Aviation Regulations prohibit the operation of an aircraft in a careless or reckless manner so as to endanger the life and property of anoth · (FAR § 91.9).

94. Unless otherwise authorized by Air Traffic Control:

a. Turbine-powered aircraft must maintain, within the airport traffic area, an altitude of at least 1,500 feet above the surface of the airport until further descent is required for safe landing [FAR § 91.87 (d)(1)];

b. Large aircraft approaching to land on a runway served by an Instrument Landing System (ILS) must, if the aircraft is ILS equipped, operate the aircraft at or above the glide slope between the Outer Marker and the Middle Marker [FAR § 91.87(d)(2)];

Civil Aeronautics Act of 1938, which are somewhat less comprehensive than the provisions of the 1958 Act quoted above, to declare invalid an ordinance which prohibited

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c. An airplane approaching to land on a runway served by a visual approach slope indicator, must maintain an altitude at or above the glide slope until a lower altitude is necessary for safe landing [FAR § 91.87(d)(3)];

d. An aircraft approaching to land at an airport served by a tower must circle the airport to the left [FAR § 91.87(e)(1)];

e. An aircraft taking-off from an airport with an operating control tower must comply with any departure procedure established at that airport by the FAA [FAR § 91.87(f)(1)];

f. When landing or taking-off from an airport with an operating tower and for which a preferential runway system has been established by the FAA, a large aircraft, assigned a preferential runway by Air Traffic Control, must use that runway [FAR 91.87(g)];

g. Large aircraft approaching for landing at John F. Kennedy International Airport are required to maintain an altitude of at least 1,500 feet above the surface so long as practicable [FAR § 93.33; 14 CFR § 93.33]; and

h. Departing aircraft are required to climb to an altitude of 1,500 feet as rapidly as practicable (FAR § 91.87(f)).

95. Pursuant to Title VI of the Act (promotion of safety of flight by prescribing and revising standards, rules and regulations) the Administrator has promulgated rules and regulations governing the operation and maintenance of aircraft (FA Parts 43, 91), the certification of airmen (FAR Part 61), the issuance of type certificates (FAR Part 21), the issuance of and standards for airworthiness certificates (FAR Part 21, Sub-part H) and the issuance and use of air carrier operating certificates (FAR Part 121).

96. Every aircraft manufacturer prepares an operating manual for each model of aircraft produced and these manuals, if approved by the FAA after inspection and testing of the aircraft, set forth the maximum demonstrated performance limits of the aircraft.

97. The manufacturer's manual must contain all the certificate limitations of the aircraft and performance data necessary for operation, including required techniques for operation such as those needed

air flights over the Village of Cedarhurst at altitudes of less than 1,000 feet. The opinion can be read either as a holding that the entire field of regulation of aircraft flight has been pre-empted by the federal government, or as a holding that the particular ordinance involved was in conflict with the federal regulatory scheme. In *Loma Portal Civic Club* v. *American Airlines, Inc., supra,* the California Supreme Court chose the narrower reading of the *Cedarhurst* case. Whichever reading is accepted, it is clear that *Cedarhurst* is square precedent for holding the Hempstead ordinance invalid, for in effect there is square con-

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for normal take-off and landing, emergencies, obstacle take-off and climb-out, maximum climb angles, degree of allowable bank on turning and crosswind operations.

98. Such airplane flight manuals contain all the data respecting the critical performances of the airplane, and set forth the information needed to achieve the minimum acceptable level of safety in operating the airplane in an emergency.

99. A copy of the appropriate manual for its model is required by regulation to be carried aboard each and every aircraft.

100. Each commercial airline, pursuant to regulation, prepares its own operating or flight manuals directly from the FAA approved manufacturer's manuals.

101. The manuals are, under the regulations, binding upon all flight personnel; they contain operating procedures and techniques for the entire operation of the aircraft, and include FAA route maps, navigational charts and approach and departure patterns.

102. Each such manual prepared by an air carrier reproduces the certificate limitations and performance data sections of the FAA approved manufacturer's manual without change except in format.

103. When the material required by federal regulation is included, the airline's manual may be substituted for the FAA approved manufacturer's manual aboard an aircraft.

104. Operating manuals prepared by any air carrier for use of its personnel must be approved by the FAA upon its publication, and all alterations, amendments or revisions must also be approved by the FAA.

flict between the local ordinance and federal regulation in each case; indeed, the Hempstead ordinance is in effect a more comprehensive regulation of air traffic patterns than was the Cedarhurst ordinance. (For one thing, it would bar flights at altitudes much higher than 1,000 feet; see, e.g., Finding No. 199:[3] the vast majority of commercial jet aircraft could comply with the ordinance on take-off from JFK only by flying over the Town at minimum altitudes ranging from 5,050 to 14,200 feet for turbojet and from 3,900 to 11,300 feet for turbofans.)

The Town argues that Judge Dooling erred in concluding that the ordinance must be tested as if there were a set of ordinances each enacted by a bordering town, and taken all together enveloping the airport. Reliance is placed on the statement in *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440, 448 (1960) that the court would not consider the argument raised by the appellant there (who was contesting the constitutionality of a smoke abatement ordinance enacted by the City of Detroit as it applied to its vessels operating in interstate commerce) that different communities might enact smoke abatement ordinances with different standards, because the appellant had pointed to no such ordinances. The Town's analogy is false. The problem in this case is that Hempstead's ordinance would cause aircraft to fly over other towns, *not* that different towns might enact different noise ordinances. More important, there was no conflict between local and federal regulation in the *Huron* case; the problem there was undue burden on interstate commerce.

The Town also argues that *Cedarhurst* is irrelevant, because it regulated flight paths, while Hempstead's ordi-

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[3] 199. The same calculations indicate that the vast majority of commercial jet aircraft could comply on take-off only by flying over the Town of Hempstead at much higher minimum altitudes (in the range 5,050 to 14,200 feet for turbojets and in the range 3,900 to 11,300 feet for turbofans).

nance regulates noise. That ignores the essential point in the case, which is that some noise ordinances necessarily regulate flight paths, and the District Court found that Hempstead's is one of those.[4] In view of that finding, the injunction naturally followed. The order granting preliminary injunction is affirmed.

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[4] In view of the conflict between the ordinance and the federal regulation we need not consider the questions of federal pre-emption, and undue burden on interstate commerce. In some situations, federal legislation and regulation is deemed so pervasive as to rule out all state and local attempts to regulate in the areas thus "pre-empted" by the federal government. See, e.g., *Campbell* v. *Hussey,* 368 U. S. 297, 82 S. Ct. 327 (1961). The area of flight patterns and procedures *may* be one of these; this court's opinion in the *Cedarhurst* case implies that it is, whereas the California Supreme Court's opinion in *Loma Portal Civic Club* v. *American Airlines, Inc.* says that it is not. See also *City of Newark, New Jersey* v. *Eastern Airlines,* 159 F. Supp. 750 (D. N. J. 1958).

The third point involves the question whether the ordinance unduly burdens interstate commerce. If it was an undue burden on commerce for the State of Arizona to regulate the length of trains operating within the state, see *Southern Pacific Co.* v. *State of Arizona,* 325 U. S. 761, 65 S. Ct. 1515 (1945), it may be that this particular ordinance, found to regulate aircraft flight paths and procedures, is an undue burden on commerce. But the problem arises that it is this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; another noise ordinance might not have that effect.

Opinion of Dooling, *D. J.*

(R., pp. 5510-5539)

Nine major American-flag air carriers, the Port of New York Authority, Charles H. Ruby as president of the Air Line Pilots Association, three air line pilots, individually and as representatives of their class, and the Administrator of the Federal Aviation Agency (as intervenor) have sued to enjoin the enforcement against them of the Town of Hempstead Unnecessary Noise Ordinance (No. 25), Article II, as amended March 10, 1964, so far as it applies to aircraft using John F. Kennedy International Airport. Plaintiffs have moved for a preliminary injunction against violations of the ordinances by the plaintiffs. Some four thousand pages of testimony have been taken, elaborate affidavits and detailed exhibits have been presented and the parties have, in addition, agreed in effect on many of the background and underlying facts. In addition, tape recordings of actual flyovers monitored by the Town's acoustical expert were played back under controlled conditions which reproduced in the Courtroom as nearly as possible the actual experience of flyovers against a background of normal domestic sounds.

It is concluded that the plaintiffs and intervenor are entitled to enjoin *pendente lite* enforcement of the Ordinance and that the Town is not entitled to a preliminary injunction against violations of the Ordinance by the plaintiffs. The facts have been found separately and will not be repeated in detail here.

The Town of Hempstead lies east of Kennedy Airport and extends both farther north and farther south than the Airport. Some 150,000 residents of Hempstead live within four miles of the Airport. The easterly ends of the five runway strips at Kennedy Airport are from 1,300 to 20,850 feet from the Hempstead boundary.

Opinion of Dooling, D. J.

The conflict in the present case arises out of the Town's addition to its Unnecessary Noise Ordinance of a new article forbidding anyone from operating a mechanism or device (including airplanes) which creates a noise within the Town exceeding either of two "limiting noise spectra". The noise spectra are set out in two tables; the Table I spectrum sets out eight octave bands of center frequencies (in cycles per second) from 63 in the first octave band to 8,000 in the eighth octave band, and sets forth the noise limit for each band in decibels of "band pressure level" (referred to the conventional base of 0.0002 microbars, considered the pressure level of a sound at the threshold of audibility). The decibel limits range from 92 decibels in the first or lowest pitched band to 52 decibels in the eighth or highest pitched band, thus recognizing that high pitched sounds are more "annoying" than low pitched sounds of equal pressure level. The Ordinance treats as a violation any transient noise having a "duration" exceeding twelve seconds in the daytime hours 7:00 A.M. to 7:00 P.M., or exceeding six seconds in the night hours 7:00 P.M. to 7:00 A.M. The second or Table II spectrum applies to "steady noise" exceeding one minute in duration and the limiting band pressure levels are, in each octave band, 20 decibels lower than the corresponding Table I value. "Duration" of transient noise (during the entire period when the noise from a source is first distinguished from the ambient noise until the noise from that same source finally recedes into the ambient noise) is defined as the time beginning when the noise first exceeds a certain band pressure level until it no longer exceeds the same band pressure level, provided it remains above the same band pressure level for at least one-third of the total "duration". Exceeding the band pressure level in any one octave band is a violation even if all other octave band noises are well below their limiting levels. It is not sug-

gested that the "limiting noise spectra" of the Ordinance are unreasonably low viewed as stating sound levels above which noise is irritatingly loud when heard in private dwellings.

There is no question, indeed both sides insist, that take-offs from and landing approaches to Kennedy Airport regularly produce noise that exceeds the limiting noise spectrum of Table I in Hempstead while the aircraft are passing over parts of the Town. And, in what may be taken to be a typical enough year, in 48% of the landings the aircraft passed over some part of Hempstead and in 36% of the take-offs the aircraft passed over some part of Hempstead. The parties assume that Kennedy Airport will be used more intensively in future, and that in general, the aircraft using the Airport will be larger and will use jet engines of greater thrust than those presently in use.

Plaintiffs and the intervenor contend that the Town is impotent to impose such anti-noise legislation as is here involved because it amounts to forbidden regulation of interstate and foreign commerce. Defendants contend that the Ordinance is a proper exercise of police power to protect the welfare of its citizens and that it does not operate in any field actually occupied by federal action or peculiarly served for federal action. Defendants argue strenuously that overflights can be all but eliminated by changing take-off and landing approach procedures in logical extension of existing procedures already approved by the Federal Aviation Agency (FAA) for certain take-offs and landings at Kennedy Airport.

It would be difficult to exaggerate the magnitude of the regional and national commitment to Kennedy Airport, and the importance of its role in the interstate and intercontinental transport of mail, passengers and cargo, and it is needless to add that air transport, and particularly long

distance air transport, is not an optional alternative to ground and water transport but is indispensable. The two other major airports serving the greater Metropolitan area, LaGuardia and Newark, operated under a common control through the Port of New York Authority, do not, with Kennedy, provide all the airport capacity the region requires. The search for new airport facilities to relieve the overburdened airports of the present and make room for the future has been publicly conducted for years.

In the years since 1948, when the Port Authority undertook to operate Kennedy, turbo and fan jet aircraft have all but displaced turbo and piston driven propeller craft. Larger, heavier and faster than propeller craft, the jets have demanded lengthened runways, and exacted new constants of air traffic management. Broadly, the airport base they required was, in absolute terms, larger in every dimension than what had been required for propeller craft, and the inverted truncated cone of air space resting on the airport, that can be thought of as representing the zone marked by the jets' landing glide slopes of about three degrees, was far nearer the edges of the airport and closer down on the bordering communities. It was as if every existing propeller craft runway had been suddenly moved out toward the boundary of the airport. The margin of laterally insulating air that had sheltered the neighborhood of the airport from take-off and landing noise was radically reduced and the impact on the surrounding communities was marked and unhappy.

The Town of Hempstead, neighboring the airport to its east, is the largest town in the State. It is 128 square miles in area and has grown rapidly in population in recent years; its population was 432,506 in 1950, was 740,738 in 1960, and was estimated at nearly 806,000 in September 1963. In 1964 there were about 225,000 dwelling units in the town, and the population density in the areas nearest to the Airport exceeded 10,000 persons per square

mile. It is estimated that 150,000 people live in the incorporated villages that lie within three miles of the Airport. The Town is primarily residential.

The problem with which the Town Ordinance deals does not affect the whole Town. Parts of the Town-Levittown and Wantagh, for example—are as far from the center of the Airport as is Central Park. Thickly populated areas in Queens, including the Rockaway Peninsula, and Brooklyn are as close to the center of the Airport as the northwest corner of the Town, which is affected by flights taking off from or landing on the northeast-southwest oriented runways at Kennedy. The noise problem is not peculiar to Hempstead nor does it equally affect the many communities in the Town. It is a problem that affects communities in terms of their proximity to the Airport quite without reference to town, city and borough boundaries.

The dimensions of the noise problem cannot be minimized. It is, however, one of the manifold of environmental problems that press on a society in which the pace of industrialization steadily outstrips the capacity to deal with its modification of the total environment of urban and suburban existence. Perhaps the aircraft noise problem differs in that it appears to be unavoidable, in the present stage of technical development, and not a consequence of the failure to take feasible precautions or to provide practical remedies.

The testimony has dealt mostly with turbo-jet and turbo-fan aircraft since they are the ones on which the problem centers and they are steadily displacing propeller driven aircraft. The testimony—and this area is non-controversial—showed that the noise sources are the compressor whine produced by beating of the blades and vanes on the air and the sound produced outside the engine by the exhaust discharge, moving at high velocity and shear-

ing through the ambient air and dragging it along in eddies that increase in size as they are swept along. The sound wave length—and sound pitch—of the eddies is related to their diameter. Turbo-jet and turbo-fan engines, while broadly similar as noise sources, differ in that the wake velocity of the turbo-fan is relatively lower and more of the energy of the engine is used in the compressor, which has an annular discharge directly to the air. Jet aircraft noise is thus predominantly the product of relative mass flow between the ambient air and exhaust discharge. There is no indication that it could be muffled like an automobile engine or that progress in diminishing noise-production by jet engines can in the foreseeable future do more than mitigate it by such advances as the turbo-fan represents in relation to the turbo-jet.

Given the jet engine, with its noise characteristics, the amount of noise it produces in service as it affects the neighborhood of an Airport is determined by the airframe of the aircraft, its take-off weight or landing weight, the thrust applied by its engines, the flap setting of the wings and other physical constants. The evidence showed plainly take-offs and landings are essentially mathematical solutions of problems in physics and not inspirational piloting. The evidence is very clear that a very high degree of skill and judgment in the piloting of aircraft is indispensable, but the point is that, to the uninitiate, the flight manual is an immense array of graphs and tables that translate aircraft weight, air temperature and humidity, change in weight during flight due to fuel loss, radius of turn, angle of bank, and many other elements into quantitative measures of air speed, thrust setting, flap setting, etc. . . . The testimony made it very clear that flying a jet transport is a complex enterprise.

The aircraft in flight is inevitably a noise source. It travels at the center of a sphere of sound that attenuates

with distance in accordance with the law of inverse squares ("spherical divergence") and by an absorption constant determined by atmospheric conditions and the octave band level of the sound; the higher frequency sounds are much more affected by absorption than low frequency sound. In general doubling the distance at which a noise is measured reduces it by six decibels. The noise of the aircraft is inseparable from it, and the evidence is clear that the noise cannot be much or safely mitigated by diminishing thrust at the levels at which take-offs and landings are executed. The evidence explored these matters exhaustively and they are detailed in the findings.

The picture that emerges clearly is that the aircraft are operated in a thoroughly responsible manner and with an attention to engineering detail that would have been difficult to credit without the thorough evidentiary elaboration it received during the trial. Equally clear is the demonstration that noise is regularly created in the Town which radically exceeds the limiting noise spectra of Table I of the Ordinance. The evidence supports no other conclusion than that continued operation in accordance with present operating procedure will create noise in the Town substantially in excess of the ordinance criteria. The records of overflight that were in compliance indicate that the flights were at altitudes so high that the aircraft could not land at or take-off from Kennedy at all if required to maintain those compliance altitudes over Hempstead. The various monitorings of flights produced aggregate samples that were sufficiently large, and free from the suspicion of pre-selection and tendentious exclusions, to establish that the pattern of systematic non-compliance with the ordinance was a direct consequence of the basic plan of airport use and was not due to differences among pilots or among airlines or, among jet aircraft, to differences in take-off weight or aircraft size, although all of these factors bore on the degree of non-compliance.

The collision between the present mode of operating the Airport and the Hempstead ordinance is, thus, direct and complete. The ordinance is a noise ordinance in objective. Hempstead has, presumably, no desire to regulate the conduct of the Airport for regulation's own sake. Yet the Ordinance can achieve its objective only if overflights are above the calculated altitudes required to achieve compliance. If the Ordinance is to be complied with, landing approaches and take-off procedures long in use, and chosen for valid air traffic and safety reasons, will have to be abandoned.

The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decibel limit for the aircraft is directly to exclude it from the lower air that it cannot use without exceeding the decibel limit. The Town recognizes this, for it proposes, with ingenious analysis, a new pattern of Airport use the essence of which is that overflights of Hempstead will be radically diminished and almost all those that do occur will be at heights at which compliance seems a possibility. In a word, the Ordinance does not forbid noise except by forbidding flights and it is, therefore, the legal equivalent of the invalid Cedarhurst Ordinance. *All America Airways* v. *Village of Cedarhurst,* E.D.N.Y. 1952, 106 F. Supp. 521, aff'd, 2d Cir. 1953, 201 F.2d 273; after final judgment, aff'd, *sub. nom. Allegheny Airlines* v. *Village of Cedarhurst,* 2d Cir. 1956, 238 F.2d 812. Like the Cedarhurst ordinance, it denies the lower air to aircraft and closes against them landing approaches and take-off paths to an established airport in contravention of the federally granted public right of freedom of transit through navigable air space (49 U.S.C. § 1304) including the air space needed to insure safety

in take-off and landing of aircraft [49 U.S.C. § 1301(24)]. See also *City of Newark* v. *Eastern Airlines,* D.N.J. 1958, 159 F. Supp. 750.

It would not be enough to save the ordinance that it is grounded in a concern for local order and public health, so that, if the ordinance had been enacted in another context it might have been valid. *Cf. Weber* v. *Anheuser-Busch, Inc.,* 1955, 348 U.S. 468 479-481. The decisive question is whether the ordinance (operating as it must if it is to achieve its objective), conflicts with federal law, or invades a field of legislation reserved to the national government. Given the necessary effect of the ordinance as it applies to interstate and international aircraft flights in the navigable air space surrounding Kennedy Airport, it must be concluded on the present record that the ordinance is invalid. The legislation operates in an area committed to federal care, and noise limiting rules operating as do those of the ordinance must come from a federal source.

To dispose first of an argument presented in various forms: the case is not involved with landowners' rights, or with concepts of trespass or nuisance. The ordinance is not an exercise of landowners' rights, but it is, if valid, an exertion of police power purely as such; it as much restricts the rights of Hempstead landowners to create excessive noise as it does the right of overflying aircraft. So far as landowners are concerned, they are constitutionally entitled to just compensation if overflights are such in nature, proximity and frequency as to amount to a taking of the property for public purposes (*United States* v. *Causby,* 1946, 328 U.S. 256; *Griggs* v. *Allegheny County,* 1962, 369 U.S. 84); but that does not constrict the federally granted public right of freedom of transit through air space, including that needed for safe landing and take-off, and certainly confers no legislative power on municipal-

ities. *Cf. Avery* v. *United States,* Ct. Cls. 1964, 330 F.2d 640, 642, as to compensable interferences with the enjoyment of property. Such a case as *Swetland* v. *Curtiss Airports Corp.,* 6th Cir. 1932, 55 F.2d 201, dealing with a private landing field and not with a public airport, enjoined the operation of the field as planned on nuisance grounds, but it is not expressive of the present-day law applicable to public airports. Contrast *Loma Portal Civic Club* v. *American Airlines, Inc.,* 1964, 61 Cal. 2d 582, 394 Pac. 2d 548; *Martin* v. *Port of Seattle,* 1964, 64 Wash. 2d 309, 391 Pac. 2d 540. And, again, the question is not what rights landowners may or may not have but what ordinances the Town may validly enact.

Such an ordinance as Hempstead's cannot be considered in the accident of its particular circumstances. Thus, much that the Town argues about the possibility of operating the Airport without intrusions into the Town's air space is wholly irrelevant. In the perspective of power, the ordinance must be tested as if it were one of a set of ordinances each enacted by a bordering town, and all, taken together, enveloping the airport. Diversion of the airport traffic over another Town would then be impossible and each ordinance would be revealed in its inner nature as a direct regulation of aircraft flight. The test is whether the power of enactment is present; to show that, adventitiously, the power, as sought to be exercised, may not render airport operations impossible, but may, only require their diversion to other parts of the navigable air space, shows only that the consequences of the exercise of the power may be avoidable, because of accidental features of the circumstances in which it is exercised; it does not show that the exercise of the power is valid. The question remains, may the municipalities that surround an airport adopt such ordinances as Hempstead's which deny to aircraft those parts of the navigable air space that cannot be used without causing noise on the ground in excess of specified limiting noise spectra.

The regulation of interstate and foreign navigation has from the beginning of our constitutional history raised questions of the relative scope of state power and of the power of the national government. *Gibbons* v. *Ogden,* 1824, 22 U.S. (9 Wheat.) 1, 196-197, 209-212, 230-237; *Cooley* v. *Board of Wardens,* 1851, 53 U.S. (12 How.) 299, 319-320. The inquiry whether regulation of the navigation of aircraft in interstate and foreign commerce is a field —in the language of *Cooley*—"imperatively demanding a single uniform rule" does not need to be and cannot be broadly answered. But legislation, whatever its purpose, that denies access to navigable air space by local rule cannot but be regarded as a plain and forbidden exertion of the power to regulate commerce as such. *Cf. Leisy* v. *Hardin,* 1890, 135 U.S. 100. By the very nature of the power exercised, it could be used by neighboring towns to impose different and inconsistent rules, and the operator of aircraft thus be required to conform to the most exacting rule. *Cf. Southern Pacific Co.* v. *Arizona,* 1945, 325 U.S. 761, 767-769.

But even if the commerce clause were not thought without more to preclude local action of the kind here involved, the actual exercise by the Congress of the power to regulate in this field is so pervasive as to preclude valid enactment of the Hempstead Ordinance. It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation. Federal aid for public airport development is provided (49 U.S.C. §§ 1301 et seq.) starting from the basis of an unqualified assertion of the public right of freedom of transit through the navigable air space of the United States. Carriers and routes are certificated by the Civil Aeronautic Board, the FAA certificates aircraft and air men. The Administrator of the FAA is

authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft for the navigation and protection of aircraft and for the protection of persons and property on the ground, including rules as to safe altitudes of flight and for the prevention of aircraft collision. In exercising his rule-making authority the Administrator is subject to the provisions of the Administrative Procedure Act. He is authorized and directed to assign by rule, regulation or order the use of navigable air space to insure the safety of aircraft and the efficient utilization of air space. The Administrator is authorized—within the limits of appropriations—to acquire and operate air navigation facilities where necessary and to provide necessary facilities and personnel for the regulation and protection of traffic. The Adminstrator's powers include the power to prescribe by regulation the minimum altitudes of flight defining the lower limit of navigable air space.

The powers granted by the Congress are not dormant but actively exercised. The regulations of the Administrator are of formidable proportions, impressive detail and manifest sophistication. The findings and conclusions set out those regulations and related matters that most nearly affect the present case.

For present purposes it is enough to note that the FAA prepares and publishes approach procedures and standard instrument departures (SIDs) for Kennedy Airport which are provided to pilot and, taken with the elaborate flight manuals approved by the FAA and carried in each plane, standardize every material element of a commercial airline take-off or landing including flight path, glide, slope on landing and, within limits, climb-out procedure. Every such take-off and landing is a moving part in a vast complex of regionail aircraft traffic control that involves transfer of aircraft from one FAA manual control center to

another until the aircraft is safe-landed on the runway or enroute out of the area. The weft of federal airways and electronic navigational aids mapped on the airmen's charts is a record of the elaborateness, complexity and immediacy of the federal provisions of aids to and controls of air traffic. As one of the witnesses put it, when asked about the approach of aircraft from about 200 miles out (Tr. 2530):

> "The aircraft is under continuous Air Traffic Control at all times, so therefore its track over the earth and altitude and descent and changes in altitude and final approach clearances are all controlled parts of flight. They are not free wheeling. . . ."

The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance. *Cf. Campbell* v. *Hussey,* 1961, 368 U.S. 297; *Rice* v. *Santa Fe Elevator Corp.,* 1947, 331 U.S. 218, 230-234; *Southern Pacific Co.* v. *Arizona, supra,* 325 U.S. at 779; *Cloverleaf Butter Co.* v. *Patterson,* 1942, 315 U.S. 148, 154-156; *Hines* v. *Davidowitz,* 1941, 312 U.S. 52, 67; *Pennsylvania R.R.* v. *Public Service Commission,* 1919, 250 U.S. 566, 568-569. There are, to be sure, areas of freedom within the system of controls, as, for example, in the basic rule that the pilot in command of an aircraft is the final authority on its operation [14 C.F.R. § 91.3(a)], and, again, in the degree of pilot discretion when flying under Visual Flight Rules (VFR) during fair weather as against the tighter and more sternly patterned controls operative when the pilot is under Instrument Flight Rules (IFR); and there is always the pilot's responsibility to use his judgment in emergencies, and in identifying emergencies. But these are discretions delegated to certificated airmen, flying certificated aircraft

and drawing their flight data from FAA approved flight manuals, delegated discretions dovetailed into and forming a part of the comprehensive control of air traffic and navigation by FAA regulations, tower bulletins and traffic control personnel. *Cf. Local 24* v. *Oliver,* 1959, 358 U.S. 283, 296. But in a congested area like that surrounding Kennedy Airport, and for jet transports, IFR flying is the rule and VFR procedure the exception because the pilots all but universally opt for the safeguards implicit in voluntary subjection to IFR procedures.

The Town observes that the Port of New York Authority is apparently permitted to regulate flight. It has imposed a noise limitation on take-offs, and it monitors take-offs to assure compliance; it imposes a 10:00 P.M. to 7:00 A.M. runway preferential that requires take-offs over Jamaica Bay. Valid or not, and the airlines do not concede validity, the Port Authority rules are rested on its supposed right as the airlines' landlord to impose conditions on the airlines' use of the Authority's leasehold property. See *Port of New York Authority* v. *Eastern Air Lines, Inc.,* E.D.N.Y. 1966, 259 F. Supp. 745. In obedience to this view of its own action, the Authority imposes rules on take-offs, for they occur on the Authority's property, and does not impose them on landings, for that would be an exertion of authority over approach procedures executed off the rental premises. The Authority points out, too, that its rules are expressly subordinate to the FAA rules and do not profess to authorize or direct anything not authorized under the FAA rules, regulations and Tower bulletins.

It is argued with force that the federal legislation nowhere in express words confers the power to regulate noise or to protect those living near airports from noise intrusions, and that the "Harris Report" to the Committee on Interstate and Foreign Commerce of the House

(H.R. Rep. No. 36, 88th Cong. 1st Sess., 1963) assumed that the localities could exercise police power in the noise abatement field. But the point would seem rather to be whether the Congress authorized the FAA to ignore noise considerations in regulating noise-inseparable air traffic in the perspective of safety to the aircraft and to persons and property on the ground. The FAA is not free to ignore, and it has not ignored, noise abatement considerations in its work on aircraft design review, airport planning, airway establishment and local traffic control, nor in drafting its flight control regulations and bulletins. The public interest in safely attainable quiet is obvious. The preferential runway system established by the FAA for Kennedy Airport is noise-oriented, and so is its regulation requiring large aircraft to enter the Kennedy Airport traffic area at not less than 1,500 feet (14 C.F.R. 93.33); the general rule requiring large departing aircraft to climb to 1500 feet as rapidly as practicable [14 C.F.R. § 91.87(f)(2)] serves that purpose as well as others, as do the tracks established for approach-procedures and for take-off vectors. The assumption of the Harris Report that local police power could function cannot be taken to express the view of the Congress nor to negate either the content of the statutes, or the practice of their administration; no legislative action was taken on the report.

The town argues from *Huron Portland Cement Co.* v. *City of Detroit,* 1960, 362 U.S. 440, that such local exercises of police power are valid even if they affect instrumentalities of commerce. The Court there sustained a local smoke abatement ordinance as applied to a federally licensed and enrolled vessel which was subject to much federal regulation, including annual inspection requirements that extended to its boilers. The Court considered that the smoke ordinance did not directly regulate commerce. The Court noted (362 U.S. at 448) that

the law did not "destroy the free right of passage." The Hempstead Ordinance on the contrary does deny the right of free passage. The *Huron* case, it will be seen, did not hesitate to test the smoke ordinance for its effect on commerce; the case makes plain that the ordinance in question to be valid must be not only rooted in a proper and real local police power interest, but it must also be free of direct regulation of commerce, it must not burden commerce, and it must not operate in a field fully occupied by federal legislation.

By the test applied in *Head* v. *New Mexico Board of Examiners,* 1963, 374 U.S. 424, 429-430, to a state statute addressed to a public health interest, there is here, on the present record, that direct conflict between federal action and the ordinance which requires invalidation of the ordinance. As the findings explain in detail, the Ordinance forbids flight paths that the FAA has approved for landing approaches and for take-offs. For example, the instrument landing system (ILS) approach approved by the FAA for the left runway on a 220° heading passes over an outer marker 5.6 miles from the landing threshold of the runway at 1,692 feet, and the path descends on 2° 45′ glide slope to 218 feet when 0.6 miles from the threshold. The outer marker is in Hempstead and this ILS approach could not be used by present day jet aircraft without violating the ordinance. The ILS approach to the right runway on a 310° heading, similarly has its outer marker at 5.6 miles in Hempstead, and descends on a glide slope of 2° 30′ from 1,557 feet at the outer marker to 198 feet at the middle marker 0.6 miles from the landing threshold. What are called "VOR" approaches to the left runway on 310° heading pass over Hempstead at relatively low altitudes on approach headings of 321°, 297° and 285° and at glide slopes not exceeding 3 degrees. All these landing approaches involve direct conflict with the ordi-

nance. Similarly the take-off procedures involve flight over Hempstead at altitudes that inevitably produce noise in excess of the ordinance limits in the Town from the aircraft of the present day.

The instances cited are the easily visualized direct collisions that meet the strict test of *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 1963, 373 U.S. 132, 142. The conflict, however, is also subtler. Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot co-exist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic. *Cf. Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 1948, 333 U.S. 103, 105-106; *Northwest Airlines, Inc.* v. *Minnesota*, 1944, 322 U.S. 292, 302-303 (concurring opinion of Mr. Justice Jackson). What Mr. Justice Jackson said, concurring, in the latter case points up the essential conflict, and beautifully expresses what is far truer today (322 U.S. at 303):

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges,

> rights and protection, so far as transit is concerned, it owes to Federal Government alone and not to any state government."

The Town has presented, with impressive skill and ingenuity, a program for changing flight patterns at Kennedy Airport, allegedly within the philosophy of the present pattern and the capabilities of present-day aircraft, so as substantially to eliminate flights over Hempstead. The record support for the program is far from adequate, and it appears to make assumptions about cross-wind and tail-wind tolerances and circling procedures on landing and take-off that do not correspond with existing safe-flying procedures. It would appear too that it overlooks, in estimating the fraction of time that tail and cross winds would interdict use of preferred runways, that summing of the times that the wind is in a quarter corresponding to, or perpendicular to, a runway heading is not enough, because it omits to take account of the fact that winds in other quarters may contribute components that belong in the summation of interdicting conditions.

Moreover, the Town's program includes suggestions for diverting traffic over Far Rockaway and Queens that can not be admitted as a valid part of a professed demonstration that such an ordinance is valid, or, at least, not burdensome to commerce, because it can be complied with; to contribute to such an at best doubtful argument for validity, the demonstration would have to assume that Far Rockaway and Queens have identical ordinances identically enforced, and then show that compliance with all was possible without halting or burdening the use of navigable air space.

There are other and momentous objections to the Town's suggested method of operating the airport. A full scale study of the traffic pattern of the region would be a

prerequisite to accepting the suggestions as presenting a means of compliance. In any such examination other communities would in principle, be entitled to be heard. *Cf. Ashbacker Radio Corp.* v. *F.C.C.*, 1945, 326 U.S. 327, 5 U.S.C. § 1003 The technical data would have to be elaborated beyond the present record, complete as it is, to illuminate the meaning and validity of certain assumptions of aircraft capability used in the Town's suggestions, and other matters.

But, as indicated above, the very making of the Town's suggestion for a new mode of operating the airport to achieve compliance demonstrates the invalidity of the ordinance. It illustrates forcefully that the ordinance so radically regulates the use of the navigable air space that a new plan of landing approaches and take-off procedures must be devised and aircraft must be excluded from all except the upper reaches of the navigable air space over Hempstead in order to comply with the ordinance.

As the findings indicate, the nature of the case is, beyond question, such that irreparable injury is implicit in enforcement of the ordinance.

It is concluded that plaintiffs are entitled to a preliminary injunction against the enforcement of the ordinance and that the Town is not entitled to an injunction against plaintiffs' violating the ordinance.

In the light of Rule 65(a)(2) and the divergent positions of the parties on the question of the availability and admissibility of further evidence, the question of further hearing will have to be taken up at counsel's convenience.

Brooklyn, New York
June 30, 1967.

JOHN F. DOOLING, JR.,
U. S. D. J.

Constitutional and Statutory Provisions

The relevant provisions of the Federal Aviation Act of 1958, as amended 49 U.S.C. 1301 *et seq.*, are as follows:

49 U.S.C. 1301(18)

"Federal airway" means a portion of the navigable airspace of the United States designated by the Administrator as a Federal airway.

. . .

49 U.S.C. 1301(24)

"Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

. . .

49 U.S.C. 1303

Consideration of matters in public interest by Administrator.

In the exercise and performance of his powers and duties under this chapter the Administrator shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of

both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

49 U.S.C. 1304

Public right of transit.

There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States.

49 U.S.C. 1341(a)

(a) Establishment; Administrator; appointment; powers and duties.

There is established the Federal Aviation Agency, referred to in this chapter as the "Agency". The Agency shall be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate. The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Agency, and shall have authority and control over all personnel and activities thereof. In the exercise of his duties and the discharge of his responsibilities under this chapter, the Administrator shall not submit his decisions for the approval of, nor be bound by the decisions or recommendations of, any committee, board, or other organization created by Executive order.

Constitutional and Statutory Provisions

49 U.S.C. 1346

Fostering of civil aeronautics and air commerce.

The Administrator is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States and abroad.

49 U.S.C. 1348(a), (b), (c), (e)

Airspace control and facilities.

(a) Use of airspace.

The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

(b) Air navigation facilities.

The Administrator is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air navigation facilities wherever necessary; (2) to operate and maintain such air navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

(c) Air traffic rules.

The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft and land or water vehicles, and between aircraft and airborne objects.

* * *

(e) Exemptions.

The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest.

. . .

49 U.S.C. 1353(a), (b), (c)

Development planning.

(a) Use of navigable airspace; location of landing areas, Federal airways, radar installations, and air navigation facilities.

The Administrator is directed to make long range plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the orderly development and location of land areas, Federal airways, radar installations and all other aids and facilities for air navigation, as will best meet the needs of, and serve the interest of civil aeronautics and national defense, except for those needs of military agencies which are peculiar to air warfare and primarily of military concern.

(b) Aircraft, aircraft engines, propellers, and appliances.

The Administrator is empowered to undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft, aircraft engines, propellers, and appliances. For such purpose, the Administrator is empowered to make purchases (including exchange) by negotiations, or otherwise, of experimental aircraft, aircraft engines, propellers, and appliances, which seem to offer special advantages to aeronautics.

(c) Research and development.

The Administrator shall develop, modify, test, and evaluate systems, procedures, facilities, and devices, as well as define the performance characteristics thereof, to meet the needs for safe and efficient navigation except for those needs of military agencies which are peculiar to air warfare and primarily of military concern, and select such systems, procedures, facilities, and devices as will best serve such needs and will promote maximum coordination of air traffic control and air defense systems. Contracts may be entered into for this purpose without regard to section 529 of Title 31. . . .

49 U.S.C. 1354(a)

Other powers and duties of Administrator.

(a) Generally.

The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this chapter, as he shall deem necessary to carry out the provisions

. . .

of, and to exercise and perform his powers and duties under, this chapter.

. . .

49 U.S.C. 1371(a)

Certificate of public convenience and necessity.

(a) Essentiality.

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

. . .

49 U.S.C. 1371(e)(1)

Terms, conditions, and limitations.

(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

49 U.S.C. 1423(a)(1)

(a) Authorization to issue; application; investigation; tests; issuance of type certificate.

(1) The Administrator is empowered to issue type certificates for aircraft, aircraft engines, and propellers; to specify in regulations the appliances for which the issuance of type certificates is reasonably required in the interest of safety; and to issue such certificates for appliances so specified.

. . .

Constitutional and Statutory Provisions

49 U.S.C. 1508(a)

Declaration of national sovereignty in air space; operation of foreign aircraft.

(a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace those portions of the adjacent marginal high seas, bays and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Air craft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of July, one thousand nine hundred and sixty-eight.

Present:

HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

AMERICAN AIRLINES, INC., et al., THE PORT OF NEW YORK AUTHORITY, and CHARLES H. RUBY, et al.,
Plaintiff-Appellees,

THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY,
Intervenor-Appellee,

against

TOWN OF HEMPSTEAD, PALMER D. FARRINGTON, as Presiding Supervisor of the Town of Hempstead, RALPH G. CASO, as Supervisor of the Town of Hempstead, JOHN H. BENOIT, EASA EASA, JAMES P. NIEHOFF, and GEORGE A. MURPHY, as Councilmen of the Town Attorney of the Town of Hempstead,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs against the appellants.

A. DANIEL FUSARO,
Clerk.